

August 10, 2000

D.T.E. 00-47

Petition of the Towns of Aquinnah, Barnstable, Bourne, Brewster, Chatham, Chilmark, Dennis, Edgartown, Eastham, Falmouth, Harwich, Mashpee, Oak Bluffs, Orleans, Provincetown, Sandwich, Tisbury, Truro, West Tisbury, Wellfleet, and Yarmouth, and the counties of Barnstable and Dukes County, acting together as the Cape Light Compact, for review and approval of their Aggregation Plan and Form of Electric Supply Agreement pursuant to G.L. c. 164, § 134.

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I. INTRODUCTION

On May 8, 2000, the Towns of Aquinnah, Barnstable, Bourne, Brewster, Chatham, Chilmark, Dennis, Eastham, Edgartown, Falmouth, Harwich, Mashpee, Oak Bluffs, Orleans, Provincetown, Sandwich, Tisbury, Truro, Wellfleet, West Tisbury, and Yarmouth and the Counties of Barnstable and Dukes (collectively, the "Compact") submitted an aggregation plan ("Plan"), a report in support of the Plan ("Report"), an electric supply agreement ("ESA"), and supporting documents to the Department for review and approval pursuant to G.L. c. 164, § 134(a). The Compact, through a vote of its representatives, approved the Plan. All towns in the Compact formally voted to approve the Compact's ESA with Select Energy.

The Department docketed the matter as D.T.E. 00-47. Pursuant to notice duly issued, a public hearing was held on June 1, 2000.⁽¹⁾ The notice requested that interested persons submit comments on the Compact's Plan to the Department. Written comments were submitted by the Division of Energy Resources ("DOER"), the Attorney General of the Commonwealth ("Attorney General"), Commonwealth Electric Company ("ComElec" or the "Company"), and the Compact. On June 1, 2000, ComElec petitioned to intervene as a full party and requested that the Department "conduct full adjudicatory proceedings pursuant to G.L. c. 30A, in order to determine the rights, duties and privileges of ComElec in the context of the Compact's Plan" (ComElec Motion at 1).

II. PETITION TO INTERVENE AND REQUEST FOR ADJUDICATION

A. The Company

ComElec seeks to intervene in this proceeding, arguing that it will be substantially and specifically affected because the Compact seeks an order from the Department that would allow the Compact, or its supplier, to include certain customer notifications regarding such customer's rights to "opt out" of the Compact's plan in the customer bill envelopes (id. at 2). The Company maintains that "as the distribution company that the Compact has exclusively proposed to target for customer aggregation and to gain access to the Company's billing envelopes, Commonwealth is uniquely affected by the Compact's proposal" (id.).

In addition, the Company requests that the Department conduct an adjudicatory proceeding limited to a review of the issue of "the Compact's request for an order to require the Commonwealth to insert Compact-specific notifications into Commonwealth's customers' bills" (id. at 4). The Company argues that because its property rights are specifically at issue, the Department should adjudicate this issue pursuant to G.L. c. 30A (id. at 5).⁽²⁾

The Company opposes the Compact's request that the Department sever and defer any adjudicatory proceedings on the bill-access issue (Company Reply Comments at 2). The Company argues that the Department should not defer a decision on this issue because it is ripe for consideration. Specifically, the Company argues that the Compact's Plan must be considered as a whole in order to determine whether it meets the requirements of G.L. c. 164 (id. at 3).

The Company, citing the Supreme Court's decision in Pacific Gas & Electric Company v. Public Utilities Commission of California, 475 U.S. 1, 106 S.Ct. 903 (1986), also argues that its constitutional property and free speech rights are implicated by the Compact's proposal and maintains that if the Department delays action on the issue, the Company's rights to protect its interests in other venues will also be delayed, resulting in costs to both the Company and the Compact (id. at 3). The Company argues that severing the issue of the Compact's proposal to include opt-out notices in the Company's envelope would result in inequitable treatment of customers because the issue of adequate notice of customers' rights under the Plan would be resolved only for large industrial and municipal customers (id. at 3, 4). The Company claims that the Department should resolve this issue during this phase of the Plan's review in order to allow the Company sufficient time to protect its interests in other venues, stating that if the Department grants the Compact's request to use its bill envelopes to distribute notices, it would consider pursuing a constitutional claim in another venue in order to protect its property and free speech rights (id. at 4).

B. The Compact

The Compact states that it does not oppose the Department granting intervenor status "on the sole issue of the Compact's request for limited access to the Company's bill envelopes" (Compact Response at 1). The Compact argues that because the Department has broad discretion to limit intervention, and because no other party has sought to intervene, the Department should exercise that discretion and limit the scope of the intervention to the issue of access to the envelope (id. at 2). Further, the Compact requests that the Department sever and defer any adjudicatory proceedings it may allow (id.). The Compact's request is based on the fact that its Plan is phased in over a period of several years. Therefore, delayed resolution of the issue of access to the envelope will not limit the ability of the Compact to meet its initial obligations (id.).

The Compact argues that the issue is not ripe for consideration because it does not need to gain access to bill envelopes for at least one or possibly two years (id. at 1).⁽³⁾ The Compact states that pursuant to the Plan, it is committed to providing the required initial notice to customers either in the electric bill or in a separate notice (id. at 2).⁽⁴⁾ The Compact acknowledges that until such time as it receives permission from the Department granting access to the Company's bill envelopes it will use a separate mailing. Further, the Compact argues that ComElec's reply factually misconstrues the Compact's request, relies on an inapposite case law, and is without merit, and that the Company's request that the Department decide the issue now should be rejected (id.). The Compact asserts that because the issue is not yet ripe for consideration, the Company's objections are not ripe and that the Department need not adjudicate this issue at this time (id.). Moreover, the Company's right to protect its interest in other venues will not be at issue with regard to this particular matter until such time as the Department issues a decision (id. at 3).

C. Analysis and Findings

While the Company petitioned the Department to intervene in this proceeding and requested that the Department adjudicate the Compact's plan in accordance with the

provisions of G.L. c. 30A, the Compact requests that the Department sever the issue of access to the envelope and defer any proceeding on the limited issue until such time as the issue is ripe for consideration.

G.L. c. 164, § 134(a) does not prescribe a specific process that the Department must follow in conducting its final review and approval of a municipal aggregation plan. The Department's discretion to determine the style and scope of a proceeding is clearly established. See e.g., Cablevision Systems Corp. v. Department of Telecommunications & Energy, 428 Mass. 436, 439 (1998). The Department finds that, while the issue of the Compact's access to the Company's bill envelope for the purpose of customer rights notification pursuant to the opt-out provisions of municipal aggregation should be considered further, Department review and approval of the Compact's Plan should not be delayed pending such consideration. Therefore, the Department will sever this issue from this proceeding and will begin a separate investigation of the issue.

The Department today issues a notice opening an investigation limited to the question of whether the Compact, as a municipal aggregator, should be allowed access to ComElec's bill envelope for the purpose of the customer rights notification pursuant to G.L. c. 164, § 134(a)⁽⁵⁾ - in short, whether this provision, in the words of § 134(a), ¶ 4, meets the "requirements established by law," including judicial determinations. In the interest of resolving this question for this Plan and for others yet to come, the Department is resolved to determine the issue within calendar year 2000.

III. STANDARD OF REVIEW

St. 1997, c. 164 ("Electric Restructuring Act" or "Act") inserted G.L. c. 164, § 134(a),⁽⁶⁾ which authorizes any municipality or group of municipalities to aggregate the electrical load of interested electric customers within its boundaries, provided that the load is not served by a municipal lighting plant. Upon approval by its local governing entity, a municipality or group of municipalities may develop such an aggregation plan, in consultation with DOER, providing detailed information to consumers on the process and consequences of aggregation. G.L. c. 164, § 134(a) requires that a municipal aggregation plan provide for universal access, reliability, and equitable treatment of all classes of customers and meet any requirements established by law or the Department concerning aggregated service.

A plan must include: (1) an organizational structure of the plan, its operations, and funding; (2) rate setting and other costs to its participants; (3) the method for entering and terminating agreements with other entities; (4) the rights and responsibilities of program participants; and (5) termination of the program. G.L. c. 164, § 134(a) provides that a municipal aggregation plan must be submitted to the Department for final review and approval. The Department is precluded from approving a municipal aggregation plan if the price of energy would initially exceed the price of standard offer, unless the applicant can demonstrate that (1) the price will be lower than the standard offer in subsequent years, or (2) such excess price is due to the purchase of renewable energy. G.L. c. 164, § 134(a).

Participation in a municipal aggregation plan is voluntary and a retail electric customer has the right to "opt out" of plan participation.⁽⁷⁾ G.L. c. 164, § 134(a). The statute

requires municipalities to inform electric consumers of (1) automatic plan enrollment and the right to opt out, and (2) other pertinent information about the plan (id.).

The Department's review of a plan will ensure that it meets the requirements of G.L. c. 164, § 134(a) and any other statutory requirements concerning aggregated service. In addition, the Department will determine whether a plan is consistent with the provisions in the Department's regulations contained in 220 C.M.R. § 11.00, et. seq. that apply to competitive suppliers and electricity brokers. Although the Department's regulations exempt municipal aggregators from certain provisions contained therein,⁽⁸⁾ the regulations provide no such exemption for the competitive suppliers that are selected to serve the municipal aggregation load.

G.L. c. 164, § 134(a) specifically exempts a municipal aggregator from two requirements included in 220 C.M.R. § 11.05. First, a municipal aggregator need not be licensed as an electricity broker by the Department under the provisions of

220 C.M.R. § 11.05(2) in order to proceed with an aggregation plan. As established in G.L. c. 164, § 134(a), a municipal aggregator is allowed to proceed with its plan upon approval by its municipal governing body. Second, a municipal aggregator is not required to obtain customer authorization pursuant to G.L. c. 164, § 1F(8)(a) and 220 C.M.R. § 11.05(4). The opt-out provision applicable to municipal aggregators replaces the authorization requirements included in the Department's regulations.

A municipal aggregator is not exempt from the other rules for electric competition.⁽⁹⁾ To the extent that a municipal aggregation plan includes provisions that are not consistent with Department's rules, the Department will review these provisions on a case-by-case basis.

IV. SUMMARY OF COMPACT'S PLAN

A. Organizational Structure

The Compact is an intergovernmental organization, consisting of 21 towns and two counties, that has been authorized by votes of town meeting, boards of selectmen, town council, and county commissioners (Plan at 1-4; Vol. II of Compact Filing, Tab 1). The Compact was formed in 1997 for the purpose of representing "consumer interests in the emerging competitive markets for electricity. It seeks to aggregate all consumers to negotiate the best rates for the supply and distribution of electricity and to advance consumer protection for the residents and businesses of Cape Cod and the Vineyard" (Plan at 1-4). The Compact's governing document is the "Inter-Governmental Agreement of the Cape Light Compact," which was formally executed by each member town after full discussion (Report at 6).

The Compact's policy and program decisions are made by its Board of Directors, on which every member town has a representative. Barnstable County provides the day-to-day management and supervision of the business affairs of the Compact, providing office and meeting space and administrative support, and acts as the Compact's procurement agent (Plan at 6-7).

The Compact plans to offer two programs to participating customers: (1) the Community

Choice Power Supply Program ("Power Supply Program"), and (2) the Cape/Island Save Energy Efficiency Program ("Energy Efficiency Program").⁽¹⁰⁾ The Power Supply Program is designed to reduce the amount consumers pay for electric energy and to gain other favorable economic and non-economic terms on service contracts" (*id.* at 6-8). Under the Power Supply Program, the Compact is responsible for developing, through a competitive bid and negotiation process, a contract with a power supplier to provide firm, all-requirements service to participating customers in each member town. Following Department approval of the power supply contract, each member town may accept or reject such contract. No supply contract is binding on a member town, until approved by that town (*id.* at 6-8, 12). As of the date of filing, 16 towns and two counties had approved the ESA, subject to Department approval; the remaining five towns were to vote at a later date (Report at 14 n. 7; Volume II of Compact Filing at Tab 9).

The Compact stated that it developed the Plan in consultation with DOER, citing numerous meetings, discussions, and correspondence between March 1998, when an initial outline of the plan was presented to DOER, and February 1999, when a "review copy" of the Plan was presented to DOER (Report at 9-10). The Compact stated that it presented its Plan for public review from March 1999 through May 1999 (*id.*).

B. Power Supply Program Operations

The Compact stated that, based on a two-year competitive solicitation process, it chose Select Energy to be the competitive supplier for the Power Supply Program (Report at 13-15). The Power Supply Program establishes the following schedule for phase-in of customer participation:

- (1) December 2000 -- large commercial/industrial and certain municipal customers
- (2) March 2001 -- additional municipal customers
- (3) September 2001 -- smaller commercial customers
- (4) September 2002 -- residential customers

(*id.* at 15).

The Plan allows Select to delay the date on which the first group of customers will begin receiving generation service under the Power Supply Program which is appropriate, the Compact stated, given the volatility of the wholesale market. However, once service is initiated for the first group, all customers must be phased in within a period of 24 months (*id.*)

The Compact has established the Power Supply Program Education and Information Plan ("Education Plan") to meet the "information needs of consumers and legal requirements regarding initial notification, quarterly notifications, and other notification required by law" for municipal aggregation plans (*id.* at 15). Under the Education Plan, the Compact will provide 60-day advance notice to electric consumers in its service area prior to the phase-in date for each customer class. The notice will inform consumers of their right to opt out of the Power Supply Program and will include a comparison of the Power Supply Program's prices and terms and conditions with standard offer service (Plan at 12-13; Report at 17-19)⁽¹¹⁾

The Power Supply Program provides that each consumer will receive a pre-addressed "opt-out postcard" that the consumer must return to ComElec in order to opt out of the Power Supply Program. Consumers who do not return the postcard will automatically be enrolled by ComElec as competitive customers of the program's power supplier (Report at 17-19; Company Response to Information Request DTE-1-5). In addition, the Power Supply Program provides that all new customers who move into the Compact's service area will be enrolled automatically in the Plan, with the right to opt out at a later date. ComElec will be required to enroll all such consumers as customers of the power supplier (Plan at 16; Report at 26-28; Company Response to Information Request DTE-1-2).

The Compact seeks a waiver from the provision in the Department's information disclosure regulations, included in 220 C.M.R. § 11.06, that requires competitive suppliers to mail information disclosure labels directly to all of their customers on a quarterly basis.⁽¹²⁾ The Compact stated that, because its customers will be located within a distinct geographic region, it can satisfy the information disclosure requirements more efficiently and at lower cost through a combination of (1) news releases, (2) public service announcements on the town government channel, other cable stations, and radio stations, (3) announcements at town meetings, (4) inserts in newsletters of various organizations, (5) public presentations, and (6) electronic communications via the Compact's website (*id.* at 19-20).

Finally, the Plan includes a provision that allows Select to switch customers from competitive supply to default service

(ESA at 15).

C. Funding of the Power Supply Program

The Power Supply Program was budgeted at \$297,000 for fiscal year 1999 and \$259,000 for fiscal year 2000. These amounts were funded through Barnstable County's budget. The Compact stated that the Power Supply Program's future costs, which it anticipates will be lower than the start-up costs, will continue to be funded through the Barnstable County budget (id. at 10). However, in the event that Barnstable County funding is no longer available, the Compact may utilize alternate funding sources, including an "administrative fee" charged to Power Supply Program participants (id.).

D. Rate Setting and Other Costs to Participants

The Power Supply Program will offer participating customers rates for generation service that will be determined through a competitive solicitation. The Compact guarantees that its prices will be lower than ComElec's standard offer rates for each customer class and for every year that standard offer will be offered (Report at 20-22; ESA, Exh. A; Compact Response to Information Request DTE-1-6). The Compact stated that, even though the differences between the Power Supply Program's prices and standard offer prices are small initially, the benefits of the Power Supply Program will be more evident when the Company's default service customers pay prices that equal prevailing market prices (Report at 20-22).

The Plan allows for four circumstances under which the prices listed in Exhibit A of the ESA may be revised. First, if ComElec's standard offer prices change from the projected prices prior to the Compact's acceptance of the service initiation date, the supplier prices will change by 50 percent of the change in the Company's standard offer prices (ESA, Exh. A; Compact Response to Information Request DTE-1-3). Second, if standard offer prices increase subsequent to the Compact's acceptance of the service initiation date, the supplier's prices will increase by 50 percent of the increase in the Company's standard offer prices (ESA, Exh. A; Compact Response to Information Request DTE-1-3). Third, as stated above, participating customers may incur an additional "administrative fee," not to exceed \$0.0003 per kilowatthour ("KWH"), if additional funding is required to support the administrative costs of the Power Supply Program (Plan at 15; Report at 28; Compact Response to Information Request DTE-1-3). Finally, the Compact may impose a charge, not to exceed \$0.00025 per KWH in the initial year and \$0.00075 in subsequent years, to fund renewable energy or energy efficiency activities (Report at 28; Compact Response to Information Request DTE-1-3).

The Power Supply Program's rates will be noted on consumers' bills as the "generation charge" (Plan at 14-16). Regulated rates for customer service, distribution service, transmission, service, and an access charge, will continue to be charged by ComElec at levels approved by the Department (id.). The Compact will recommend to its customers that they should elect to receive a single bill that would include all charges, but consumers have the option of electing to receive two bills, one for generation service and another for other charges (id.).

E. Method for Entering and Terminating Agreements with Other Entities

The Compact states that its board will take formal votes before entering and terminating agreements with other entities (Report at 29). The process for entering, modifying, enforcing, and terminating agreements shall comply with the relevant provisions of G.L. c. 30B, the Intergovernmental Agreement of the Cape Light Compact, the Barnstable County Charter (since the county is the Compact's fiscal and administrative agent)⁴³ and other state and federal laws (id.; Plan at 14).

F. Rights and Responsibilities of Program Participants

The Plan states that participants in the Power Supply Program "shall enjoy the protections of law afforded to consumers as they currently exist or as they may be amended from time to time." In addition, all electric consumers in participating towns have the right to decline to participate through the opt-out mechanism (Plan at 17). The Plan states that all participants shall meet all standards and responsibilities required by the Department, "including payment of billings and access to essential metering and other equipment to carry out utility operation" (id.).

G. Termination of the Power Supply Program

The Compact states that the term of the ESA with Select runs through December 31, 2004, unless renewed by the parties or earlier terminated as permitted under the terms of that agreement (Report at 30-31). The Compact's Governing Board may opt to dissolve the Power Supply Program upon termination or expiration of the ESA; in such case, the Compact will provide customers 90 days' advance notice of program termination, unless emergency circumstance do not allow it (id.). In addition, member towns may choose not to participate in an extension, renewal, or subsequent supply contract the Compact has negotiated, but such withdrawal would apply only to those towns (Plan

at 13-14).

V. SUMMARY OF COMMENTS

A. DOER

DOER stated that it is satisfied with the "overall viability" of the Plan and recommends Department approval of the Plan, subject to certain modifications (DOER Comments at 1-2). In support of the Plan, DOER stated that the Compact has satisfied the requirements of G.L. c. 164, § 134 by (1) consulting with DOER in the development of the Plan, (2) obtaining the necessary votes of governmental approval from participating towns, (3) sponsoring numerous public outreach efforts for citizens to express their views concerning the aggregation effort, (4) establishing an organizational structure that affords sufficient accountability to participating towns and other aggregation participants, (5) providing for an alternate funding mechanism if county funding is curtailed, and (6) including an energy supply contract that provides, in detail, the contractual arrangement between the Plan's supplier and its participants (id. at 2-8).

With regard to universal access and the Plan's equitable treatment of all customer classes, DOER stated that, given that the supply market is not yet fully competitive, a phased implementation (within a time certain) of all customer classes is a reasonable strategy (id. at 6). DOER noted that the Plan further provides for the equitable treatment of all customer classes by requiring its competitive supplier to adhere to the Department's consumer protection rules and regulations (id. at 6-7, citing ESA, Article 11).

DOER supports the Compact's request for access to ComElec's monthly bill for the purpose of providing notification and information regarding the Plan, including the process by which consumers may opt out (id. at 4). However, DOER opposes the Compact's request for a waiver from the Department's information disclosure requirements, stating that "the Compact bears a burden to disclose product information in a similar, if not identical, form as that provided by ComElec" to standard offer and default service customers (id. at 5). DOER added that it encourages the Compact to utilize the alternative methods identified in the Plan as a supplement to the required quarterly mailings (id.). Finally, DOER requests that the Department require the Compact to supply relevant market information, consistent with DOER's statutory reporting functions (id. at 7).

B. Attorney General

The Attorney General limited his comments to the provision in the Plan that affords the supplier the right to suspend its obligation to supply power to the Compact's customers and to instead transfer those customers temporarily to default service or standard offer service, whichever is appropriate (Attorney General Comments at 1-2). The Attorney General stated that this provision raises two issues regarding (1) the appropriateness of a municipal aggregator providing service under the equivalent of an "interruptible"⁽¹⁴⁾ contract, and (2) whether such contractual provisions should be permitted at all, and if so, under what conditions. The Attorney General suggested that the Department defer consideration of these issues at least until the Department issued the order in D.T.E. 99-60 (id.)⁽¹⁵⁾

C. ComElec

1. Initial Enrollment of Customers

ComElec opposes the Compact's proposal requiring the opt-out forms to be returned to the Company for processing, with ComElec bearing the responsibility of switching, or enrolling, those customers who do not opt out of the Plan (ComElec Comments at 5-6). ComElec argues that this proposal will lead to customer confusion regarding its role in the enrollment process and will require ComElec to bear the costs of processing the opt-out forms and enrolling the customer, costs that ComElec asserts should be borne by the Compact and its customers (id.). ComElec proposes that the opt-out forms be returned to a third party, who would then notify the Plan's competitive supplier which customers have chosen to participate in the Plan (ComElec has agreed to provide the party with a complete list of its customers). The supplier would then submit an electronic enrollment transaction for each participating customer, consistent with protocols established by the Electronic Business Transactions ("EBT") Working Group and approved by the Department (id.). Additionally, the Company stated that the opt-out form needs to include more details regarding the Plan to properly inform consumers of the Plan and their options. (id.).

2. Enrollment of New Customers

ComElec opposes the Compact's proposal regarding the automatic enrollment of new customers into the Plan, stating that (1) its technology system and the Department-approved EBT protocols do not provide for such automatic enrollment by distribution companies, and that the necessary modification to its system would be costly, and (2) automatic enrollment of new customers would not provide these customers with appropriate notice of their right to opt-out, as required by statute (id. at 6-7). ComElec recommends a process by which it would provide the Compact with a

list of customers moving into its service territory on a weekly basis, so that the Compact could send an opt-out notice to the customer. If the customer does not respond within two weeks, the Compact's supplier could then enroll the customer (id.).

3. Customer Switching to Default Service

ComElec objects to the provision that would allow the Compact's competitive supplier to switch customers to ComElec's standard offer or default service at the supplier's discretion. ComElec states that this provision would "place the burden on the Company and its other customers to shoulder responsibility for serving the Compact's customers when it becomes financially difficult for the Compact's competitive supplier to do so" (id. at 8-9, citing ESA § 8.4.I).

4. Other Issues

The Company seeks clarification regarding (1) its responsibility to list an "Administrative Fund" charge as a separate line item on its customers' bills, as provided for in ESA, § 5.1, stating that its current billing system does not allow for such a listing, (2) billing and payment provisions included in the ESA, § 8.4.C, that are inconsistent with the Department's regulations, 220 C.M.R. §§ 25.00 through 28.00 (e.g., bill payment due dates), (3) the release of customer credit information, as provided for in the ESA, § 8.4.H, and (4) notification to ComElec in the event of contract termination, as described in ESA, § 4.6 (id. at 8-10).

D. The Compact's Reply Comments

1. Initial Enrollment of Customers

The Compact argues that its proposed requirement that customers send their opt-out forms to ComElec to process the initial enrollments is consistent with EBT protocols for such enrollment. The Compact states that, under established protocol, a customer may call distribution companies to request a "drop" from a supplier (id. at 5-6). The Compact claims that the opt-out mechanism for its municipal aggregation plans is analogous to the "customer drops supplier" requests that distribution companies are already required to process. The Compact states that requiring its supplier to submit an electronic enrollment transaction for each participating customer would add an unnecessary cost to Plan implementation (id.).

2. Enrollment of New Customers

The Compact states that its proposal to enroll customers automatically who move into the Compact's service area will save these customers money because the Plan's rate will be below standard offer and default service rates (id. at 7-8). The Compact states that the Department should not reject procedures proposed by municipal aggregators simply because there is no existing EBT protocol to handle the mechanism. Furthermore, the Compact states that the Department should require distribution companies to work with municipal aggregators to develop any necessary EBT-related transactions for municipal aggregation programs, in keeping with the process used for developing the existing EBT transactions for competitive suppliers (id.).

3. Customer Switching to Default Service

With regard to the issue of switching customers to default service, the Compact recommends that the Department approve the Plan, but impose the condition that the Compact's supplier cannot exercise the options it may have under § 8.4.I of the ESA until further order by the Department, subject to the Department's ruling in D.T.E. 99-60 (id. at 9).

4. Other Issues

With regard to ComElec's request for clarification on billing and payment and customer credit provisions, the Compact notes that the ESA clearly states that the Plan's supplier shall adhere to existing law and regulation (id. at 9-10). The Compact stated that it will try to answer all reasonable requests from DOER, but states that the Department should not order it to do so in advance of knowing what those requests might be (id. at 14).

VI. ANALYSIS AND FINDINGS

A. Introduction

The Department's standard of review, as stated above, requires the Department to determine that a municipal aggregation plan is consistent with the requirements established in G. L. c. 164, § 134 and the Department's rules and regulations. The Department first addresses consistency with G. L. c. 164, § 134(a).

The Act included a provision authorizing a municipality, acting either individually or in concert with other municipalities, to contract for electric power and energy services for electricity consumers within its boundaries. G.L. c. 164, § 134(a). By including this provision, the Legislature recognized that a retail electric customer might have better access to lower energy prices in a restructured electric market through the purchasing option of belonging to an aggregated group rather than entering the market on an individual basis.

The Legislature also recognized that the needs of each community might be different with regard to aggregation. Therefore, while the Act delineated the parameters of the aggregation process and outlined what items a plan must contain, it also gave municipalities the ability to create an aggregation plan tailored to meet the needs of the electricity customers within each community. The Department will approve appropriate flexibility on the part of a municipal aggregator, provided the aggregator can demonstrate that its plan is consistent with the Act.

B. Consistency with G. L. c. 164, § 134

G. L. c. 164, § 134(a) establishes specific approvals and consultation required by a municipal aggregator. First, G. L. c. 164, § 134(a) requires that a municipality or group of municipalities obtain the approval of local governing entities prior to initiating a process to develop an aggregation plan. Each town participating in the Plan signed the Inter-Governmental Agreement of the Cape Light Compact, which authorizes the Compact to pursue the type of aggregation process included in the Plan (Volume II of Compact Filing, Tab 1). In addition, 16 of the member towns and the two counties have approved the ESA with Select Energy, pending Department approval (Volume II of Compact Filing, Tab 9).⁽⁴⁶⁾ Upon satisfaction of the condition that the Compact provide the Department certified copies of the record of each town's vote,⁽⁴⁷⁾ the Department concludes that the Compact will have satisfied the statutory requirement regarding governmental approvals. Second, G. L. c. 164, § 134(a) requires that a municipality must consult with DOER in developing its aggregation plan and must provide detailed information to consumers regarding the aggregation activities. The Compact met numerous times with DOER in the development of the Plan (*id.* at Tab 5).⁽⁴⁸⁾ In addition, the Compact has held a substantial number of meetings aimed at educating the public about the Compact and the Plan (*id.* at Tab 10). The Department determines that the Compact has satisfied the statutory requirement regarding consultation with DOER and consumer education. The Plan has, of course, been filed with the Department as required; and the Department has held the necessary public hearing. Finally, G.L. c. 164, § 134(a) requires that a municipal aggregation plan filing describe (1) the organizational structure, operations, and funding; (2) rate setting and other costs to participants; (3) the method for entering and terminating agreements with other entities; (4) the rights and responsibilities of participants; and (5) termination of the plan. The Compact's filing includes descriptions of each of these features of the Plan (Plan at §§ 2.0 through 6.0, 10). The Department concludes that the Compact has satisfied the statutory filing requirements.

Regarding the substance of a municipal aggregation plan, G. L. c. 164, § 134(a) requires that such plans provide for universal access, reliability, and equitable treatment of all classes of customers. The Power Supply Program is available to all electric consumers located in the Compact's member towns. In addition, customers who move into a member town after the start of the Power Supply Program will be eligible to participate (Plan at §§ 7.0, 10). Therefore, the Department concludes that the Power Supply Program satisfies the statutory requirement regarding universal access.

The reliability of a municipal aggregation plan must be examined both in terms of supply reliability and financial reliability. In terms of supply reliability, provisions of the ESA commit the power supplier to provide an "all-requirements power supply" in a reliable manner (ESA at §§ 2.1, 6.2, 6.6, 8.2; Article 10). In terms of financial reliability, the ESA contains several provisions that delineate the supplier's responsibilities in the event the supplier does not meet its physical obligations (*id.* at Articles 15 and 16). Article 15 sets forth the indemnification provisions for the Compact and participating towns. Article 16 establishes the supplier's insurance requirements and additional financial sureties and guarantees. In addition, the Plan includes an alternate funding mechanism in the event that Barnstable County funding is curtailed (Plan at § 3.0). The Department concludes that the Power Supply Program satisfies the statutory requirement regarding reliability.

Finally, with respect to equitable treatment of all customer classes, the Power Supply Program provides for a phase-in of customer participation, with all customer classes provided the opportunity to participate within a 24-month period following the initiation of service (Report at 15). The Department agrees with DOER that it would be preferable for all customer classes be able to participate immediately, but given the inchoate status of the competitive wholesale and retail generation markets, the Compact's proposal to phase in customer classes is reasonable. Therefore, the Department concludes that the Power Supply Program will satisfy the statutory requirement regarding equitable treatment of all classes of customers.

G. L. c. 164, § 134(a) states that the Department may not approve a municipal aggregation plan unless the price is below the standard offer rate (in this case, ComElec's), unless the applicant can demonstrate that (1) the price will be lower than the standard offer in subsequent years, or (2) such excess price is due to the purchase of renewable energy.

The prices listed in Exhibit A of the ESA are lower than ComElec's standard offer rates for each customer class for each year that standard offer will be available. The Plan allows the Compact to change these prices, but the revised prices cannot exceed the standard offer rates, except as explicitly allowed by statute. Therefore, the Department concludes that the Power Supply Program satisfies the price requirement established by G. L. c. 164, § 134(a).

Finally, the statute requires municipalities to inform electric consumers of their right to opt out of aggregation plans and to disclose other pertinent information about their aggregation plans. The Compact's Public Education Plan includes many means to relate this information to customers (see Report at 15-20; Plan at 12). The Department concludes that the Compact satisfies the statutory requirement regarding consumer information.

Based on the above analysis, the Department concludes that the Plan is consistent with G. L. c. 164, § 134(a).

C. Consistency with the Department's Rules and Regulations

1. Introduction

The Department identifies the following three provisions included in the Plan that are not consistent with our rules and regulations: (1) information disclosure, (2) initial customer enrollment into the Power Supply Program, and (3) automatic enrollment of new customers to the Compact's service area. The Department addresses these provisions and other issues raised by commenters.

2. Information Disclosure

The Compact has requested a waiver from the provision in 220 C.M.R. § 11.06 that requires a competitive supplier to provide to its customers, on a quarterly basis, an information disclosure label that describes the suppliers' prices, resource portfolios, emissions characteristics, and labor characteristics. The Compact stated that it can satisfy the Department's information disclosure objectives more efficiently and at lower cost through a combination of (1) news releases, (2) public service announcements on the town government channel, other cable stations, and radio stations, (3) announcements at town meetings, (4) inserts in newsletters of various organizations, (5) public presentations, and (6) electronic communications via the Compact's website.

G. L. c. 164, § 1(F)(6) requires the Department to promulgate uniform information disclosure labeling regulations, applicable to all competitive suppliers of electricity, in order to provide "prospective and existing customers with adequate information by which to readily evaluate power supply options available in the market." Consistent with the statute, the Department's regulations provide for uniform disclosure labels that include information regarding a supplier's price and price variability, customer service, and fuel, emissions and labor characteristics. 220 C.M.R. § 11.06(2). The regulations require suppliers to provide an information disclosure label to each of their existing customers "quarterly." 220 C.M.R. § 11.06(4)(c).

For aggregation plans such as that proposed by the Compact, the Department would normally require that the quarterly notification take place via individual mailings to customers, because this is the vehicle by which customers initially will be informed of their opt-out rights. However, the Department concludes that, because (1) the Compact's customers will be located in a geographically distinct region, and (2) the Compact's Public Education Plan includes many means which this information will be provided to consumers, the Compact's alternate information disclosure strategy will allow it to provide the required information to its customers as efficiently as quarterly mailings. Therefore, pursuant to 220 C.M.R. § 11.08, the Department grants the Compact's supplier an exception from 220 C.M.R. § 11.06(4)(c). The Department emphasizes that the supplier shall be required to adhere to all other applicable provisions of 220 C.M.R. § 11.06.

3. Initial Enrollment of Customers

ComElec's Terms and Conditions for Competitive Suppliers, as approved by the Department, establish the manner in which the enrollment of customers with competitive suppliers takes place.⁽¹⁹⁾ Such enrollment takes place through electronic transactions that are sent from the suppliers to the distribution companies. The Compact's proposal, which provides for ComElec to enroll customers with the Plan's competitive supplier, is not consistent with these Terms and Conditions nor with protocols established pursuant to the Terms and Conditions. The established protocols provide that distribution companies "switch" customers only in the event that a customer calls the distribution company to request that he be switched from being a customer of a competitive supplier to being a standard offer or default service customer of the distribution company. There is no provision in these protocols whereby a distribution company switches a customer from standard offer or default service to a competitive supplier. The Department concludes that (1) there is no unique feature about the Plan that would support a deviation from the established protocols, and (2) the Plan's competitive supplier should be able to effectuate the enrollments more efficiently than ComElec because the supplier is required to do so for its other customers. Therefore, the Department rejects the Compact's proposal

regarding the initial enrollment of its customers. The Department directs the Compact to work with the Company to design a method to enroll customers consistent with the Company's Terms and Conditions, and to submit such method in a compliance filing to be submitted no later than 30 days from the date of this Order.

4. Enrollment of New Customers

Pursuant to ComElec's Terms and Conditions for Competitive Suppliers, customers that move into the Company's service territory initially are placed on default service or standard offer service, in the case of new customers taking service under the Company's low-income rate. The customers remain on these services until they select a competitive supplier. The Compact's proposal, in which consumers who move into its service area after service for the applicable customer class has begun would be automatically enrolled in the Power Supply Program's competitive supplier, is not consistent with the established protocols. In this instance, the Department identifies a unique feature about the Plan, the opt-out provision, that supports a deviation from established protocols. Under the opt-out provision, consumers are deemed enrolled in the Plan unless they notify the Compact (or its supplier) otherwise. The statute does not expressly address the issue of new customer participation in municipal aggregation plans, but the Department must try to effectuate legislative purpose. Erosion of the aggregation plan's customer base might occur over time if automatic enrollment of new accounts (subject to opt-out) were not the rule. That would be retrograde to legislative desire. Logic supports the automatic enrollment of new customers, with the provision that new customers will be informed by the municipal aggregator in a timely way of their right to opt out. The automatic enrollment of these customers additionally will ensure that they receive the least expensive generation service price option available. Therefore, the Department accepts the Compact's proposal with minor revisions.

The Department directs the Company to inform new customers that they will be enrolled with the Power Supply Program's competitive supplier unless they request otherwise in an affirmative manner. The Company will, on a regular basis, provide the Compact, or its representative, with a list of new customers. The Compact will notify new customers in a timely way of their right to opt out of the Power Supply Program and will be responsible for (1) processing all opt-out forms returned to it, and (2) for ensuring that those customers' participation in the Power Supply Program is terminated. The Department directs the Compact to work with the Company to develop the implementation procedures for the enrollment of new customers and to submit such procedures in a compliance filing to be submitted no later than 30 days from the date of this Order.

5. Other Issues

With regard to the Plan's provision that allows the competitive supplier to switch customers to default service, the Department concludes that our Order on default service pricing sufficiently addresses the concerns raised in this docket because, in the future, default service will be priced at market-based levels. D.T.E. 99-60-B at 4-6. Although suppliers will not be precluded from switching their customers to default service, the incentive to do so will be lessened significantly.

With regard to the Compact's reporting of market information to DOER, the Department fully expects that the Compact will work cooperatively with DOER in meeting DOER's statutory reporting obligations. Finally, with respect to ComElec's request for clarification on certain provisions included in the ESA, the Department notes that the Compact and its competitive supplier are subject to all existing rules and regulations regarding billing and payment, and customer credit, unless specifically exempted.

VII. ORDER

Accordingly, after due notice, hearing and consideration, the Department approves the Compact's Plan, subject to the conditions established herein, and it is

ORDERED: That the Cape Light Compact submit a compliance filing consistent with the requirements of this Order within 30 days of the issuance thereof.

By Order of the Department,

James Connelly, Chairman

W. Robert Keating, Commissioner

Paul B. Vasington, Commissioner

Eugene J. Sullivan, Jr., Commissioner

Deirdre K. Manning, Commissioner

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).

1. G.L. c. 164, § 134(a) requires the Department to hold a public hearing prior to final review and approval of an aggregation plan. The Department held two hearings on June 1, 2000 at the Barnstable County Courthouse in order to accommodate the schedules of the residents within the Compact's service area.

2. The Company additionally argues that using its bills for customer notification of the Plan would (a) be inefficient because customers seldom read their bill inserts in sufficient detail to be adequately informed of their opt-out rights, and (b) confuse customers regarding the respective responsibilities of the Compact and ComElec, and would burden

ComElec personnel because the notice would be received via a ComElec envelope (ComElec Comments at 2-5).

3. The Compact stated that, because only a small number of large commercial, industrial and municipal customers will be served in the first phase of the Plan, it will not need access to the Company's envelopes until March 2001, at the earliest (Compact Comments, June 21 at 3-4).

4. The Compact stated that it can achieve approximately \$50,000 in savings if it can insert the initial notice into the Company's bill envelopes (Report at 17-19).

5. G.L. c. 164, § 134(a) requires a municipal aggregator to fully inform participating customers of their enrollment and opt-out rights.

6. G.L. c. 164, § 134(b) establishes the process for review and approval of an energy plan. The Department notes that the Compact did not file such an energy plan as part of its aggregation plan, therefore the Department will not discuss the provisions of G.L. c. 164, § 134(b) here.

7. A customer who opts out of the plan within 180 days of the start of service is eligible to receive standard offer service as if originally enrolled therein. G.L. c. 164, § 134(a).

8. 220 C.M.R. § 11.01 states that these regulations apply to "distribution companies, competitive suppliers and electricity brokers that will participate in the electric industry" in Massachusetts. The definition of electricity broker states that municipal aggregators shall not be considered an electricity broker.

9. The sections of 220 C.M.R. § 11.00 that apply to competitive suppliers and electricity brokers are § 11.05 ("Competitive Supplier and Electricity Broker Requirements"),

§ 11.06 ("Information Disclosure Requirements"), and § 11.07 ("Complaint and Damage Claim Resolution; Penalties"). In addition, § 11.04(9)(f) ("Distribution Company Terms and Conditions for Competitive Suppliers") requires that each distribution company file, for Department approval, terms and conditions that will govern the relationship between the distribution company and competitive suppliers. These terms and conditions establish, among other things, the process by which data is transmitted between distribution companies and suppliers.

10. The Energy Efficiency Program is designed to reduce customers' total electric bills through the installation of energy efficiency measures. The Compact states that it intends to submit the Energy Efficiency Program for Department review and approval at a future date, pursuant to G.L. c. 164, § 134(b).

11. Advance notification will be accomplished through direct mailings to customers and also through newspaper notices, public service announcements, and postings in town halls (Plan at 12). As discussed fully in Section II, the Compact requested that the Department direct ComElec to allow the Compact access to its billing envelopes for purposes of mailing the advance notice to customers. The Department has determined to investigate this issue separately.

12. The disclosure label provides information regarding a supplier's fuel sources, emission characteristics, and labor characteristics.

13. Future involvement of Barnstable County will necessarily depend on how far the General Court goes in abolishing Massachusetts' county government structure. The Compact may need to amend its Plan at some future date.

14. The term is used by the Attorney General in an uncommon sense to denote the migration of customers from competitive generation service to default service and back again.

15. The Attorney General's comments were filed on June 7, 2000, before the Department issued its Order on Default Service, D.T.E. 99-60-B.

16. The Compact stated that the remaining towns will vote at a later date (Report at 14).

17. G. L. c. 164, § 134(a), ¶ 3, requires authorization of aggregation by town or city vote. The individual towns of the Compact must, by their attorney, submit certified copies of the record of each town's vote in satisfaction of the Act's requirement. G. L. c. 233, § 79(a), and c. 66, § 5, provide a basis for the Department's taking notice of the record of these votes.

18. DOER, in its comments, acknowledges that there have been substantive discussions between itself and

representatives of the Compact (DOER Comments at 2).

19. 220 C.M.R. § 11.04(9)(f) ("Distribution Company Terms and Conditions for Competitive Suppliers") requires that each distribution company file, for Department approval, terms and conditions that will govern the relationship between the distribution company and competitive suppliers. These terms and conditions establish, among other things, the process by which data are transmitted between distribution companies and suppliers.